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SEC

SERVICE DATE - SEPTEMBER 19, 1997

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42003

APL LAND TRANSPORT SERVICES, INC.

v.

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

PROTECTIVE ORDER

Decided: September 17, 1997

On June 6, 1997, APL Land Transport Services, Inc. (APL), a supplier of flat cars used in intermodal transportation, filed a complaint against The Burlington Northern and Santa Fe Railway Company (BNSF), alleging that, between June 1, 1994, and December 31, 1996, BNSF did not pay market-based compensation for use of APL cars. The complaint further alleges that between January 1996 and May 1997, BNSF misappropriated APL cars and failed to observe requirements in the private car mileage tariff, ICC PHJ 6007-J. On July 10, 1997, BNSF filed its answer to the complaint. A decision served July 25, 1997, established a procedural schedule.

In a joint motion filed September 9, 1997, APL and BNSF request that a protective order be entered to protect highly sensitive, confidential, and proprietary information in documents sought by discovery. The parties assert that the information, if disclosed, would harm their competitive positions.

Good cause exists to grant the petition. Unrestricted disclosure of confidential, proprietary or commercially sensitive information and data could cause serious competitive injury to the parties. Issuance of the requested protective order ensures that such information and data produced by any party in response to a discovery request or otherwise will be used solely for purposes of this proceeding and not for any other business or commercial use. The requested protective order will facilitate the prompt and efficient resolution of this proceeding.

It is ordered:

1. The request for a protective order is granted, and the parties to this proceeding must comply with the protective order in the Appendix.
2. This decision is effective on the service date.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary

APPENDIX

PROTECTIVE ORDER

1. For purposes of this Protective Order:

(a) “Confidential Documents” are defined as documents and other tangible materials, or parts thereof, that contain or reflect highly sensitive and proprietary business information, the disclosure of which would harm the competitive position of the Disclosing Party.

(b) “Disclosing Party” means the Party that provides the Confidential Document to the other Party. “Receiving Party” means the Party that is provided the Confidential Document.

(c) “Designated Material” means any documents (including parts of documents) or information designated or stamped as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” in accordance with paragraphs 2 or 3 of this Protective Order.

2. Each Party to this proceeding who produces or discloses any documents, things, interrogatory answers, deposition testimony or information which the Disclosing Party reasonably believes to comprise or contain confidential commercial and proprietary business information, and which the Disclosing Party desires to be subject to this Protective Order, may designate the same as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL.” Any document or information which is designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” shall be handled as provided for hereinafter.

3. All documents which are designated “HIGHLY CONFIDENTIAL,” and any data contained therein, shall be restricted to access by only the individuals who have signed the Highly Confidential Undertaking attached as Exhibit A to this Order. Only (i) in-house counsel, (ii) outside counsel, (iii) outside consultants, (iv) outside analysts and (v) outside expert witnesses for a Party to this proceeding are eligible to sign this Undertaking and have access to “HIGHLY CONFIDENTIAL” documents. Persons who have signed this Undertaking shall be responsible for compliance with this Order by their respective clerical and support staffs. This Undertaking shall be delivered to counsel of record for each Party prior to receipt of access to the “HIGHLY CONFIDENTIAL” documents by the individual named in the Undertaking.

4. All documents which are designated “CONFIDENTIAL,” and any data contained therein, shall be restricted to access by only the individuals who have signed the Confidential Undertaking attached as Exhibit B to this Order, and by individuals who are eligible to review “HIGHLY CONFIDENTIAL” documents under the terms of this Order. Only employees or agents of a Party to this proceeding are eligible to sign the Confidential Undertaking. Persons who have signed this Undertaking shall be responsible for compliance with this Order by their respective clerical and support staffs. This Undertaking shall be delivered to counsel of record for each Party prior to receipt of access to the “CONFIDENTIAL” documents by the individual named in the Undertaking.

5. All Designated Material provided to a Party to this proceeding, or anyone acting on its behalf, and all notes and other documents relating in any way to any Designated Material that are developed by any individual having access to such Designated Material (the “Notes”), shall be used solely for purposes of this proceeding or any appeals therefrom (the “Proceedings”), and shall not be used for any other purpose. Any Designated Material, and any data contained therein, shall not be disclosed in any way to any person not authorized under paragraphs 4 or 5 hereof to receive access to such Designated Material, unless such disclosure is preceded by the prior written consent of the Disclosing Party or an order of the Board or its designated officer allowing for such disclosure.

6. Unless the parties agree otherwise, all Designated Material provided hereunder, and all Notes, shall be destroyed within thirty (30) days of the completion with finality of the Proceedings, and written notice of such destruction shall be provided to counsel for each Party, with the exception

that outside counsel for each Party may retain file copies of any unredacted pleadings and materials filed with the Board.

7. With respect to written submissions to the Board, neither Party may include Designated Material in any pleading, brief, discovery request or response, or other documents submitted to the Board, unless the pleading or other document is submitted under seal, in a package clearly marked on the outside as “Confidential Materials Subject to Protective Order.” All pleadings and other materials so submitted shall be kept confidential by the Board and shall not be placed in the public docket in these Proceedings except by order of the Board or its designated officers.

8. All Designated Material may be disclosed to any court reporter or notary public with official responsibilities related to this proceeding, on the understanding that these persons will honor the limitations on disclosure of Designated Material set forth herein.

9. If any Party intends to use any Designated Material in the course of any deposition in this proceeding, that Party shall so advise counsel for the deponent. Attendance at any portion of the deposition at which Designated Material is used or discussed shall be restricted to persons who may review the material under the terms of this Protective Order.

10. If a Party fails to designate one or more Confidential Documents as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” in a timely fashion as provided herein, it may make such a designation subsequently by notifying the Receiving Party in writing. After receipt of such notification, such Confidential Documents thereafter shall be treated as if they had been designated in a timely fashion and the Receiving Party thereafter will promptly cause such documents to be properly marked as provided herein and certify to the Disclosing Party that such marking has occurred.

11. Nothing contained herein shall preclude any Party from seeking an order of the Board or its designated officer in this proceeding that documents, deposition testimony, or answers to interrogatories designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” should not be treated as such. Nor does anything contained herein prohibit disclosure by a Receiving Party of Designated Material to (i) any person involved in the proceeding, or matters directly related thereto, and (ii) either employed or retained by the Disclosing Party, including without limitation fact and expert witnesses, consultants, analysts and attorneys.

Exhibit A

HIGHLY CONFIDENTIAL UNDERTAKING

I, _____, have read the Order Regarding Production of Confidential Documents entered in STB Docket No. 42003, understand the same, and agree to be bound by its terms. I agree not to use any Confidential Documents as defined in the Order and stamped “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL,” or any data or information derived therefrom, for any purpose not permitted under the Order. I understand that I am only being given access to “CONFIDENTIAL” and “HIGHLY CONFIDENTIAL” documents because of the commitments that I make in this Undertaking. I further understand that my use of Confidential Documents, and data or information derived therefrom, for any purpose not permitted under the Order could cause damage to the Disclosing Party or third parties.

Dated: _____

Exhibit B

CONFIDENTIAL UNDERTAKING

I, _____, have read the Order Regarding Production of Confidential Documents entered in STB Docket No. 42003, understand the same, and agree to be bound by its terms. I agree not to use any Confidential Documents as defined in the Order and stamped “CONFIDENTIAL,” or any data or information derived therefrom, for any purpose not permitted under the Order. I understand that I am only being given access to Confidential Documents because of the commitments that I make in this Undertaking. I further understand that my use of Confidential Documents, and data or information derived therefrom, for any purpose not permitted under the Order could cause damage to the Disclosing Party or third parties.

Dated: